

2007

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2007 U. Chi. Legal F. 405 (2007)

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You Can't Get There from Here: Managing Judicial Review of Immigration Cases

Lenni B. Benson[†]

As in mathematics, so in natural philosophy, the investigation of difficult things by the method of analysis, ought ever to precede the method of composition.¹

For centuries alchemists studied the properties of metals, hunting for the magical method that would render lead into gold. The great scientist Sir Isaac Newton devoted dozens of years to the pursuit of mercurial methods that would create the desired transmutation.² He pored over the secret works of alchemists and kept his own notes in code. He never found the mercury that would transform lead into gold. Yet it is Newton's contributions to the development of a scientific approach, his careful measurements and his insights into the gravitational forces that ultimately transformed science.

This paper argues that Congress and policy analysts must stop hunting for the magical alchemy that can transform immigration law enforcement into a perfect or "golden" system. Rather, we must turn our energies to developing a better understanding of the fundamental elements that combine or divide and shape the existing process before we can successfully design a better system. I add my voice to a growing body of administrative law scholars urging a more robust examination of the complex

[†] Professor of Law and Co-Director of the Justice Action Center, New York Law School. Thank you to my colleagues at New York Law School who commented on this paper, Seth Harris, Carlin Meyer, Sadiq Reza, Stephen Ellmann, Zuhayr Moghrabi. I am also very grateful to my research assistants, Jennifer V. Rogers, Stephanie Sado and Brian Drozda, class of 2008 and Jamie Kuebler, class of 2009. I also benefited from many conversations with alumna Sarah Kroll-Rosenbaum, class of 2005, and John R.B. Palmer. Thank you to my husband, John I. Wellington, for sharing the story of Newton the alchemist and supporting me in immeasurable ways.

¹ Issac Newton, *Optiks* (1704). An excerpt is available at <<http://www.fordham.edu/halsall/mod/newton-optics.html>> (last visited Feb 22, 2007).

² For a short biography of Newton, see James Gleick, *Isaac Newton* (Pantheon 2004).

operation of systems before Congress or the agencies endeavor to solve problems of design and administration.³

This paper is being written as Congress once again embarks on its search for the process and techniques that will result in clearer and more efficient enforcement of our immigration laws. While there are many different immigration policy initiatives in Congress, in this paper I will focus on the narrow example of judicial review of administrative immigration orders. Congress has once again considered restricting or re-channeling judicial review of immigration orders as an essential part of successful immigration law enforcement. I describe some of the current legislative proposals below. Knowing the history of judicial review of immigration orders and having read the transcripts of recent Congressional hearings, I have concluded that the statutory approaches reflect a search for a miracle “mercury” rather than a scientific approach. Newton’s principles for studying phenomena present a refreshing change from the speculations currently raging in the debates about the best “process” and “forum” for judicial review of administrative decisions. Congress must require greater inquiry and analysis before it designs the process, without this analysis it is likely to implement changes that simply do not achieve the legislative goals. More than just calling for Government Accountability Office (“GAO”) studies or other empirical assessments, I urge these legislators to think about the process in action. What are the dynamics of the judicial review process? What are the forces that work upon the design of the system and change the predicted outcomes or influence the cost and efficiency of the system?

One of the problems with the current analysis of the judicial review process is the narrow focus of the empirical inquiry. Experts testify about the workload of the federal courts and its exponential growth, but no one has fully explored the factors that have combined and intertwined to motivate more litigants to pursue federal court review. Most of the data and the accompanying assessments of the data are presented in isolation. For example, we have raw data on the volume of cases heard and disposed of in the administrative process but little information about the content and subject matter of those decisions. We can

³ See, for example, David Zarin, *Best Practices in Administrative Law*, 81 NYU L Rev 294 (2006); Donald T. Hornstein, *Complexity Theory, Adaptation, and Administrative Law*, 54 Duke L J 913 (2005); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 Minn L Rev 342, 345 (2004).

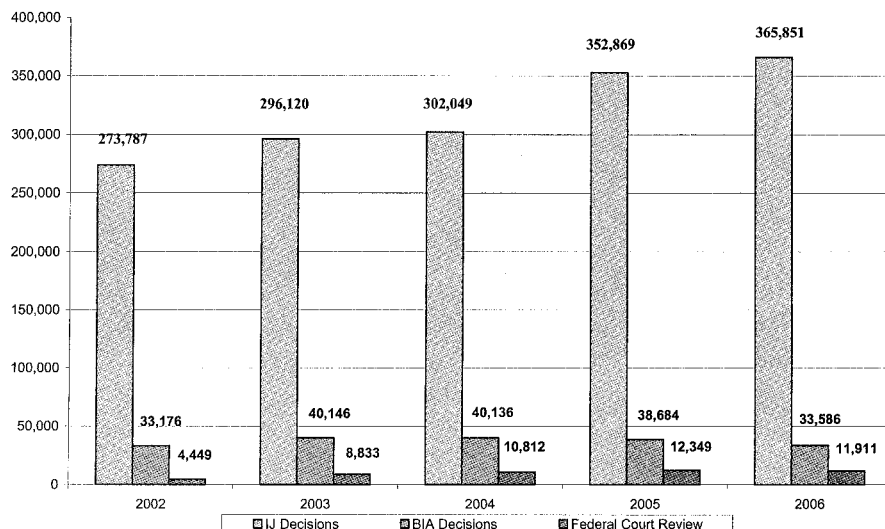
find data on the remand rate from the federal courts back to the agency but no analysis of why those cases merited remand. More importantly, the raw data do not reveal the strategies or motivations of the actors in the process.

I had to locate and synthesize the reports of several different actors to get a picture of the relative growth in the workloads of the immigration judges, the administrative appellate body, and the federal courts. Even this rough “mashup” of data produces immediate insight into the system. Below in Figure 1, is a chart revealing growth in the caseloads at all levels. While the immigration cases are growing rapidly, the workload of the BIA remains relatively constant. This snapshot reveals 12,000 review petitions in the federal courts, while the agency has processed more than 365,000 claims. To me, this is not a very high rate of appeal. Further, while the number of federal cases is growing, the rate of increase is slowing. While there was a doubling of appeals from 2002 to 2003, the next increase was around 25 percent and then around 20 percent. Last year there was a slight decrease in the rate of review.⁴

⁴ The data in this table are derived from the following sources: US Department of Justice, Executive Office for Immigration Review (“EOIR”), *FY 2006 Statistical Year Book* (Feb 2007) (“EOIR 2006 Statistical Year Book”), available at <<http://www.usdoj.gov/eoir/statspub/fy06syb.pdf>> (last visited May 10, 2007); James C. Duff, *2006 Annual Report of the Director* 115 Table B-3 (Administrative Office of the U.S. Courts 2006), available at <<http://www.uscourts.gov/judbus2006/appendices/b3.pdf>> (last visited May 10, 2007). It is noteworthy that the statistics presented on this topic in the 2005 fiscal yearbook changed for the same period in the 2006 yearbook and the agency provides the following explanation: “Data in this report have been updated, and thus may be slightly different from previously published statistical yearbook data.” *EOIR 2006 Statistical Year Book* at iv.

Figure 1

*Comparison of Workloads of Immigration Judges,
the Board of Immigration Appeals, and
Federal Court Review of Immigration Decisions*



Sources: *EOIR 2006 Statistical Year Book* at B2, S2 (cited in note 4);
Duff, *2006 Annual Report* at 115–20 Table B-3 (cited in note 4).

Yet, without understanding the forces that push and pull the workloads, how can we accurately assess the performance of the process? Phrased differently, even if we all agreed upon the contours and qualities of a judicial review scheme—the “there”—we simply cannot reach that goal until we understand the multiple factors that form the “here.” Without that study of the dynamics of the system and its component parts, we are attempting a form of modern legal alchemy. Admittedly, it is always difficult for us to separate process from substance in the debates about the forms and variety of judicial review. When Congress or the Executive expresses concern about the amount or quality of judicial review, they are really looking at a byproduct of our substantive policy. However, without systemic analysis, our substantive goals will be frustrated, and the elusive new paradigm will remain beyond our reach. We won’t be able to get “there” unless we understand and can survey the “here.”

Critics of existing procedures frequently express the view that judicial review reflects the manipulation of process to evade the substance of the law. If this is true, how significant is this observation to the entire system of immigration law enforce-

ment? Is this motivation so significant that it justifies reform of the system or elimination of judicial review? Surely the answers to these questions require sophisticated empirical study.

Even if Congress used the best scientific analytical models, the reform of judicial review is unlikely to lead to improved immigration law enforcement. First, the largest forces shaping enforcement are the actions and decisions of the enforcement agencies. These agencies have many informal enforcement mechanisms that bypass the administrative courts and can preclude judicial involvement as well.⁵ Moreover, the agencies have the discretion to offer voluntary departure or self-removal to individuals before administrative procedures begin.⁶ As I will elaborate below, the role of discretion in the agency should receive greater scrutiny from Congress and policy analysts. Further, the dynamics of our system of government mean that attorneys will use statutory classifications and administrative process to the best of their abilities to protect individual liberty and to promote the interests of their clients. Attacking judicial access results in attorneys seeking ways to protect the rule of law.⁷ Whatever the ultimate design of the system, the actors within it will bend it or

⁵ For example, the Department of Homeland Security ("DHS") can reject more applications for admission at the border via the mechanism of expedited removal found in the Immigration and Nationality Act ("INA"), INA § 235(b)(1)(A)(i), 8 USC § 1225(b)(1)(A)(i) (2000). This procedure provides for administrative review only in cases where an individual presents a credible fear of persecution or if the individual is within a protected class of individuals entitled to greater statutory and procedural protections. This class includes: citizens, lawful permanent residents, asylees and refugees, and those who are inadmissible for reasons other than fraud, misrepresentation, or lack of documents. See INA §§ 212(a)(6) and (a)(7), codified at 8 USC § 1182(a)(6) and (a)(7) (2000). The Attorney General and DHS have expanded the use of expedited removal in recent years. For a description and assessment of expedited removal see TRAC Immigration, *Immigration Inspections When Arriving in the US*, available at <<http://trac.syr.edu/immigration/reports/142/>> (last visited Feb 22, 2007); Alison Siskin, *Immigration Enforcement Within the United States*, CRS Report for Congress 10 (Apr 6, 2006), available at <<http://fpc.state.gov/documents/organization/64931.pdf>> (last visited Feb 22, 2007); Kate Jastram and Tala Hartsough, *A-File And Record Of Proceeding Analysis Of Expedited Removal*, Report on Asylum Seekers in Expedited Removal Volume II, (US Commission on International Religious Freedom Feb 8, 2005), available at <http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/index.html> (last visited Feb 23, 2007).

⁶ INA § 240B, codified at 8 USC § 1229c (2000).

⁷ See, for example, Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 Conn L Rev 1411 (1997). In this article I explain some of the normative values preserved by judicial review and describe the historical expansions and restrictions on judicial review of immigration decisions. I also predicted that attorneys and courts would "constitutionalize" the issues in order to preserve access to judicial review. See also Nancy Morawetz, *Back to Back to the Future? Lessons Learned from Litigation over the 1996 Restrictions on Judicial Review*, 51 NY L Sch L Rev 113 (2006/7) (reexamining the last ten years of litigation over the scope and forms of judicial review and in particular the attacks on access to habeas jurisdiction).

adapt it as much as possible to their private or institutional interests.⁸ Reformers should pause to consider the likely adaptations and manipulations the actors in the system will promote. Only with this attention to the forces within the systems will we come closer to achieving any policy goals.

Finally, I am unconvinced that the increase in judicial review of immigration cases is in fact a critical problem in terms of enforcing our immigration laws.⁹ Bureaucrats and members of Congress may tilt their lances at the windmill of judicial review and perhaps successfully knock out a few blades weakening the mill; but the availability or quantity of judicial review plays a small role in the operation of our nation's total enforcement efforts. It is time for Congress to stop eyeing judicial review as part of the formula essential to some desired mercury. The absence or abundance of judicial review alone will not transmute our immigration laws into a clear and effective method of controlling admission and residence in this country. Further, I value the role our judiciary plays in safeguarding individual rights and executive compliance with legislative mandates. If I define "there" as a sound, effective, efficient and manageable method of judicial review, and characterize "here" as the expensive, time-consuming and exponentially expanding reservoir of cases that is our current system, to get from "here" to "there," we must begin with close observation of the primary particles that contribute and combine and interact to create the current system.

I. EXPONENTIAL GROWTH IN THE RATE OF JUDICIAL REVIEW

It is undisputed that there has been an extraordinary increase in the number of immigration cases in the federal courts.

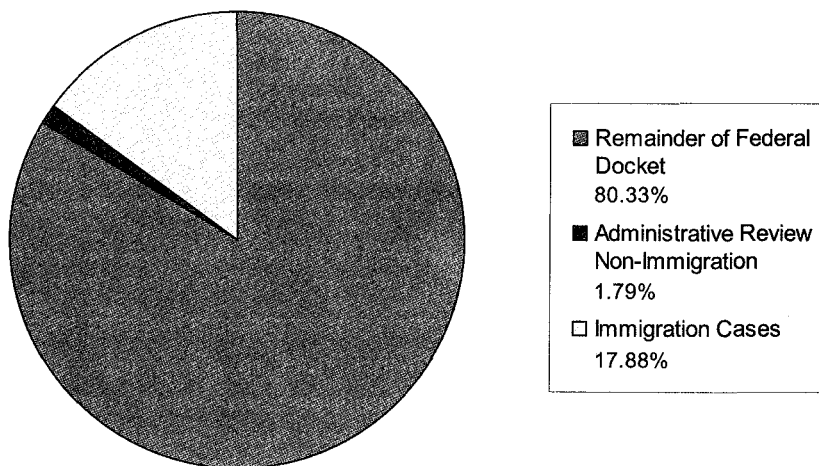
⁸ See, for example, *Liu v INS*, 475 F3d 135 (2d Cir 2007) (ruling that the court had some power to review the agency's determination of whether a claim for asylum was time-barred).

⁹ In fact, judicial review is not listed as one of the obstacles to executing on final orders of removal. In a Department of Justice Inspector General study of the enforcement rate of final removal orders and the obstacles to their execution, the Department of Justice did not enumerate judicial review as one of the problems. See Department of Justice, Inspector General, *The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders Report*, Report Number I-2003-004 (Feb 2003), available at <<http://www.usdoj.gov/oig/reports/INS/e0304/results.htm#rec2>> (last visited Feb 23, 2007). Further, in a study examining several agency actors involved in the enforcement of immigration laws, the authors found that declines in removal rates were more likely related to delays in the administrative process than to judicial review. In fact, judicial review was only briefly analyzed in the entire report. Siskin, *Immigration Enforcement* at 10 (cited in note 5). This study comes closer to the type of systemic evaluation I am recommending than any other government audit or testimony I reviewed.

The press and Congress have characterized this growth as unmanageable, a surge that would overwhelm the dockets of the circuit courts. As Chief Judge John Walker noted, "if we continue to receive immigration cases at this pace, soon the court's work [will] be almost exclusively immigration law."¹⁰

Figure 2

Immigration and Administrative Review as a Portion of the Entire Federal Docket: 2006



Source: Duff, *2006 Annual Report* at 115–20 Table B-3 (cited in note 4).

In reaction to the increased immigration caseload, Congress conducted hearings on the current system of review and considered proposals for streamlining or consolidating judicial review. In that testimony, the government reported an increase in the rate of appeal to the BIA from 6 percent to 29 percent in the last four years,¹¹ and immigration cases now represent nearly 20 percent of the entire federal courts of appeals docket.¹²

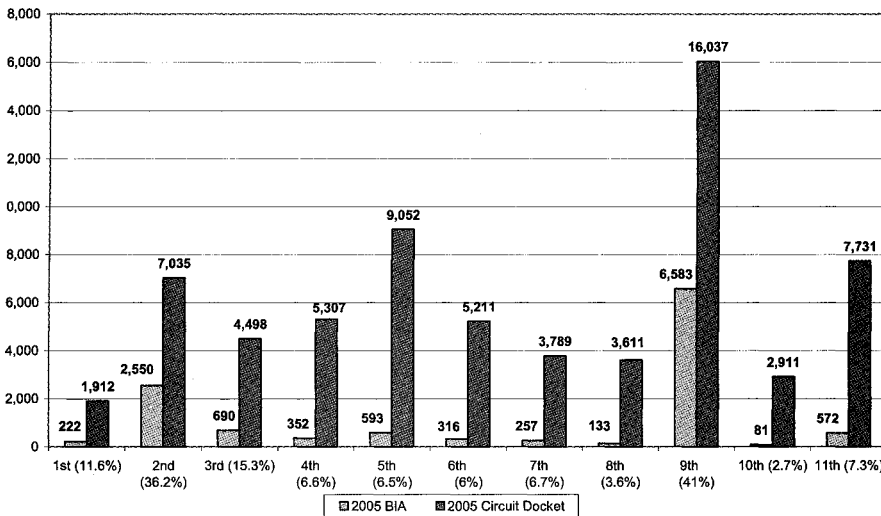
¹⁰ John M. Walker, Jr., Keynote Presentation, *Seeking Review: Immigration Law and Federal Court Jurisdiction Symposium*, available at <<http://www.nyls.edu/docs/walker%20keynote.mp3>> (last visited Feb 22, 2007). From 2005 to 2006 the total number increased by ninety cases but the rate increase slowed to 3.5 percent.

¹¹ Hearing concerning budget and resource needs of the Justice Department Civil Division for fiscal year 2007 before the House Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, 109th Cong (2006) (statement of Peter D. Keisler, Assistant Attorney General from the Civil Div of the DOJ), available at <<http://www.judiciary.house.gov/Oversight/Testimony.aspx?ID=611>> (last visited Feb 26,

In some circuits, immigration now represents nearly 40 percent of the entire docket.¹³ The images below show the percentage of BIA appeals in relation to the total docket of the circuit courts in 2005 and 2006.¹⁴

Figure 3A

*2005 Data Comparison of Circuit Courts of Appeals:
Immigration as a Percentage of Total Docket*



Source: Duff, *2006 Annual Report* at 115–20 Table B-3 (cited in note 4).

2007).

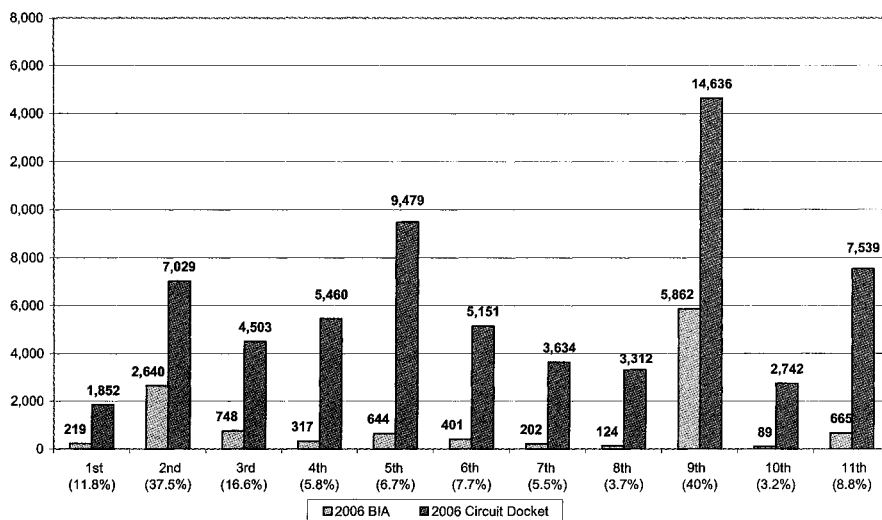
¹² As of September 2005, appeals from the BIA to federal court represented 18 percent of the civil appellate docket. There were 12,349 BIA appeals out of 68,473 appeals total in the courts of appeals. Leonidas R. Mecham, *2005 Annual Report of the Director* 114 Table B-3 (Administrative Office of the US Courts 2005), available at <<http://www.uscourts.gov/judbus2005/appendices/b3.pdf>> (last visited Feb 22, 2007).

¹³ In April of 2006, Chief Judge John Walker testified to Congress that the Second Circuit had approximately 2,500 immigration cases on its docket. Immigration Litigation Reduction, Hearing before the Subcommittee on the Judiciary, 109th Cong, 2d Sess 5 (2006) (statement of John M. Walker, Chief Judge, US Court of Appeals for the 2d Circuit), available at <http://judiciary.senate.gov/testimony.cfm?id=1845&wit_id=5214> (last visited May 10, 2007). In 2005, the Second Circuit had 7,035 cases on its docket, which means that roughly 35.5 percent of the docket was immigration cases. Mecham, *2005 Annual Report* at 115 Table B-3 (cited in note 12).

¹⁴ Duff, *2006 Annual Report* at 115–20 Table B-3 (cited in note 4).

Figure 3B

*2006 Data Comparison of Circuit Courts of Appeals:
Immigration as a Percentage of Total Docket*



Source: Duff, *2006 Annual Report* at 115–20 Table B-3 (cited in note 4).

In response to the increase, there have been multiple legislative proposals to restrict judicial review of immigration decisions, most notably in two distinct immigration reform bills passed by the House of Representatives and the Senate. In 2006, a House bill essentially eliminated judicial review of the denial of naturalization applications, visa revocations, and decisions made by consular officials.¹⁵ With regard to judicial review of removal orders in particular, the House bill required aliens seeking review of such orders to obtain a “certification of reviewability” from one federal judge before filing a petition for review with the court of appeals. Earlier versions of a Senate bill also required certificates of reviewability and, in addition, would have consolidated all immigration appeals into the Federal Circuit, without addressing the implications of such a drastic shift.¹⁶ However, after

¹⁵ HR 4437, 109th Cong, 1st Sess (Dec 6, 2005) (2006) (passed the House of Representatives Dec 16, 2005).

¹⁶ S 2611 § 701, 109th Cong, 2d Sess (Apr 7, 2006) (introduced by Senator Arlen Specter, Chairman, Senate Committee on the Judiciary). For a critique of the certificate of reviewability requirement, see Jill E. Family, *Stripping Judicial Review during Immigration Reform: The Certificate of Reviewability*, (Working Paper Series, April 17, 2007), available at <<http://ssrn.com/abstract=978531>> (last visited June 5, 2007).

a brief hearing and the testimony of several federal judges, Senator Arlen Specter and the Judiciary Committee dropped these provisions from the bill.¹⁷ Instead, the final Senate legislation called for a study by the GAO.¹⁸ The GAO would examine the federal appellate process for immigration review, consider various options for consolidating or redistributing immigration appeals, and also consider the benefit of procedural proposals such as certificates of reviewability.

More recently, in September 2006, Representative F. James Sensenbrenner, Jr., chair of the House Immigration Subcommittee, unsuccessfully attempted to attach three immigration enforcement riders to the 2007 Defense Authorization bill.¹⁹ One of these bills sought to give the Secretary of the Department of Homeland Security authority to indefinitely detain a newly created class of “dangerous aliens” who cannot be removed. The bill restricted judicial review for this class of cases to habeas corpus proceedings initiated in the federal district court in Washington, D.C., and only after the exhaustion of all statutory and regulatory remedies.²⁰

Even if one agrees that twelve thousand new immigration cases a year is too great a workload for the circuit courts of appeals, the rush to legislative reform is putting composition before study. This paper will explain why the existing data are insuffi-

¹⁷ Chairman’s Mark, EAS 6090 § 707(b) (Feb 24, 2006). For a detailed discussion of the Chairman’s Mark, see Family, *Stripping Immigration Judicial Review* at 23–26 (cited in note 16).

¹⁸ S 2611 § 707, 109th Cong, 2d Sess (Apr 7, 2006). The GAO study set forth in the Bill required the Comptroller General to consider three methods of consolidating all appeals from the BIA and habeas petitions in immigration cases into one U.S. Court of Appeals. Those methods are: (1) consolidating all such appeals into one circuit court, including the Federal Circuit; (2) creating a “centralized appellate court” consisting of judges from various existing circuits who would sit on the centralized court temporarily; and (3) creating a panel of active circuit court judges who would reassign such appeals from circuits with relatively high caseloads to those with relatively low caseloads. The GAO would consider such factors as the resources needed for each alternative, the impact on the various circuits, the possibility of using case management techniques to reduce the impact of any consolidation method, the effect of reforms in the INA on the ability of the circuits to adjudicate such appeals, the potential impact on litigants, and other reforms to improve adjudication of immigration cases.

¹⁹ The bills failed when attached to the Defense Authorization bill, but were repackaged and reintroduced days later, and passed in the House. See Border Tunnel Prevention Act of 2006, HR 4830, 109th Cong, 2d Sess (Mar 1, 2006); Community Protection Act of 2006, HR 6094, 109th Cong, 2d Sess (Sept 19, 2006); Immigration Law Enforcement Act of 2006, HR 6095, 109th Cong, 2d Sess (Sept 19 2006).

²⁰ Dangerous Aliens Detention Act of 2006, HR 6094 Title I, 109th Cong, 2d Sess (Sept 19, 2006).

cient to understand the problems in the process and will suggest areas of further inquiry.

II. THE QUALITIES OF THE "HERE"—WHAT JUDICIAL REVIEW OF IMMIGRATION ORDERS LOOKS LIKE IN 2007

Judicial review of a final order of removal²¹ takes place in the court of appeals representing the geographic circuit where the immigration removal hearing was held. Immigration hearings are heard first before immigration judges ("IJs"), administrative officers serving within the Executive Office of Immigration Review ("EOIR"), a division of the Department of Justice. IJs are under the control and regulation of the Attorney General. They do not have the independence of an Article I court. By regulation, the Attorney General has provided a Board of Immigration Appeals ("BIA") staffed by members appointed by the Attorney General. An immigration removal order becomes final within thirty days of the order of the IJ unless the individual perfects an appeal to the BIA.²²

There are over two hundred individual IJs serving throughout the United States. The geographic distribution appears to follow the concentration of noncitizens within the United States, with the caveat that the Department of Justice has prioritized the placement of judges near immigration detention centers, and in some cases, within correctional institutions. More than 50 percent of the EOIR caseload is heard in Texas, California, New York and Florida.²³ In many states, there is no sitting IJ. In some of these states, immigration removal hearings are held via videoconference. The IJs who control these videoconference hear-

²¹ By and large, the current debates in Congress have lumped all judicial review involving immigration law together and have not distinguished between or among the wide variety of administrative decisions that may be part of one immigration case. This confusion over the breadth and scope of the jurisdictional strictures in the current statutes is something that Congress should also consider evaluating and clarifying in new legislation. The government has sometimes successfully argued that restrictions on review of removal orders also apply to litigation over administrative decisions in other cases involving benefits in the immigration system even when that decision is not in anyway part of a removal proceeding. While this article is begging for everyone to recognize complexity in the system and its operation, for purposes of clarity, the discussion is limited to judicial review of removal orders.

²² If the individual did not seek administrative review of the order of removal, the federal court might find that the respondent failed to exhaust administrative remedies. See 8 CFR § 1003.1(b)(2006) (describing jurisdiction of the Board of Immigration Appeals).

²³ *EOIR 2006 Statistical Year Book* at 10, Table 1 (cited in note 4) (The workload of these courts represent 234,313 of the total workload, or 67 percent.).

ings may be in a major city or in the recently established virtual courtroom in Northern Virginia where the EOIR is headquartered.

In 2006, the EOIR reported that the individual IJs handled more than 305,000 orders, including more than 299,000 individual cases.²⁴ BIA Members and the individual IJs also rule on motions to reopen or reconsider immigration proceedings and on bond determinations. Moreover, a growing percentage of the workload of the BIA is review of matters that were never before an IJ, but instead originated from the administrative adjudications of the Citizenship and Immigration Services, a separate bureau within the Department of Homeland Security.²⁵ The workload of individual judges varies greatly. In Harlingen and San Antonio, Texas, an IJ may dispose of eight thousand cases in a year.²⁶ In other areas the workload may be closer to twelve hundred.

The exact rate of individuals seeking review from an individual judge's decision is not easily assessed from the total case figures, and the workload in any single year may include cases pending from prior years. The EOIR has estimated the rate of

²⁴ *EOIR 2006 Statistical Year Book* at C3 (cited in note 4).

²⁵ The BIA also has responsibility for administrative review of other matters such as review of a denial of eligibility for a visa category. For example, if the Citizenship and Immigration Service Bureau of the Department of Homeland Security ("CIS") found that a husband had not provided sufficient evidence of the legality of his marriage and thereby denied that husband's petition for his spouse, the BIA would be the entity that reviewed the legal analysis of the CIS. In fiscal year 2005, review of decisions from that CIS appears to be approximately 4,000 of the 42,000 decisions rendered. See US Department of Justice, EOIR, *FY 2005 Statistical Year Book S2* (Feb 2006) ("EOIR 2005 Statistical Year Book"), available at <<http://www.usdoj.gov/eoir/statspub/fy05syb.pdf>> (last visited Feb 23, 2007). In fiscal year 2006, the BIA reviewed 6,121 CIS decisions of the total 39,707 decisions rendered. *EOIR 2006 Statistical Year Book* at S2 (cited in note 4). Review of matters not originating in the immigration courts is a growing percentage of the BIA docket. Evaluating how this 10 to 15 percent of the BIA workload effects overall resource allocation would be an important question in assessing the efficiency and process of the BIA. Moreover, some of the workload of the Immigration and Customs Enforcement ("ICE") attorneys who represent the government in removal proceedings before the EOIR are initiated by charging documents prepared by supervisors and attorneys within CIS. Again, understanding how this division of the Department of Homeland Security can affect the priorities and workload of the ICE attorneys and of the courts is an important aspect of the total picture and one that I have yet to see publicly reported.

²⁶ U.S. Government Accountability Office ("GAO"), *Report to the Chairman, Committee on Finance, U.S. Senate, Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement* 13 (August 2006) ("EOIR GAO Study"), available at <<http://www.gao.gov/cgi-bin/getrpt?GAO-06-771>> (last visited Feb 22, 2007). As is noted in this article, the vast majority of these "cases" are the entry of *in absentia* orders. The government maintains that it can enter such orders even when there is no known address for the noncitizen. See INA § 240(b)(5), codified at 8 USC § 1229a (2000); 8 CFR § 1003.26 (2007).

administrative review for fiscal year 2005 as 12 percent. The EOIR data show a slight decline in the rate of appeal from an IJ decision, from 14 percent in 2001 to 12 percent in 2005.²⁷ However, in 2005 the EOIR also reported an increase in the percentage of in absentia orders—these are proceedings where the respondent failed to appear.²⁸ Accordingly, the rate of appeal may have dropped because these individuals do not yet know they are subject to a final order.²⁹ In the 2006 report, the EOIR explains that most of the increase in these *in absentia* orders occurred in Harlingen and San Antonio, Texas, and that the total number of orders decreased from 55,893 orders in 2005 to 45,268 in 2006.³⁰ Still, these two immigration courts accounted for 41 percent of the total number of *in absentia* orders. This is an example of how prosecutorial policy can drive the workload of the IJs and later the appellate bodies.³¹

The BIA currently has eleven members, a figure that has fluctuated over the past ten years. This administrative appellate body is supported by professional staff attorneys and administrative staff, both of which have steadily increased in number.

In the past, all decisions of the BIA were heard in panels of at least three judges and few decisions were made en banc. In late 1999, the BIA established a pilot program to allow a single judge to affirm the order below without writing a new opinion—the Affirmance Without Opinion (“AWO”) program. This AWO

²⁷ *EOIR 2005 Statistical Year Book* at Y1 (cited in note 25).

²⁸ In 2005, the EOIR reported a 103 percent rate of increase in orders based on aliens who failed to appear. *Id.* at H1. This huge increase immediately raised the issue of whether the government is using a different charging process or bringing more cases to the attention of the immigration courts to obtain formal orders of removal, rather than informally handling the removal of the noncitizen. In other words, is the government refusing to use its informal process known as “voluntary departure” where a letter citation is issued and the individual must depart on his own without administrative hearings?

²⁹ *Id.* at Y1.

³⁰ *EOIR 2006 Statistical Year Book* at H1 (cited in note 4).

³¹ The EOIR does not provide a full explanation of the recent increase in the *in absentia* orders, but states “The immigration court workload is dependent on the actions taken by the Department of Homeland Security (DHS). The DHS’ long standing policy known as “catch and release” was designed to release non-Mexican aliens apprehended at entry on their own recognizance. This policy resulted from DHS’ and the now defunct INS’ insufficient capacity to detain all aliens apprehended at entry. In recent years, due to this policy, the failure to appear rate has increased dramatically at the immigration courts. This has caused a subsequent increase in in absentia removal orders being issued by the immigration judges. In August 2006, DHS abolished this policy.” *Id.* at H1. There is no explanation for why DHS abandoned this approach. This is the type of dynamic interaction that needs to be studied to fully understand the workloads of these agencies.

program became more formally established in 2002.³² The EOIR reported that in fiscal year 2005, less than 20 percent of BIA opinions were issued through the AWO method.³³ The BIA maintains that the AWO program allowed it to eliminate large backlogs and to keep up with the rate of new appeals from the increased workloads before the individual IJs.³⁴ The total number of AWO decisions is not formally or separately reported in the statistical yearbooks of the EOIR.

The EOIR reported that the eleven BIA members issued 46,355 decisions, including individual cases and motions during fiscal year 2005.³⁵ The BIA received 42,734 orders during that same period.³⁶

Let us pause to consider the rate of adjudication. Eleven members resolved approximately 46,000 matters. Assuming there are 220 workdays a year, the eleven members worked 2,420 days a year and each member produced nineteen decisions per day. In an eight-hour work day that is more than 2.375 cases per hour. Apparently one in five orders is an AWO, but affirmance still requires review of the administrative record. Of course, not every decision requires the review of a large transcript, accompanying forms and exhibits, but I immediately question the quality of decisions made at this rate.

Unfortunately, the EOIR Year Books report data in five-year increments and the written descriptions of the data tend to emphasize percentages rather than actual case numbers. The casual analyst may be misled by this presentation of the data. For example, in the 2005 Year Book, the BIA reported that from 2001 to 2005, receipts increased 52 percent and completions only increased 46 percent.³⁷ In the 2006 Year Book, the BIA reported

³² 8 CFR § 1003.1(d)(2), (3) (2006).

³³ US Department of Justice, EOIR, Fact Sheet, *BIA Restructuring and Streamlining Procedures* (revised Mar 9, 2006), available at <<http://www.usdoj.gov/eoir/press/06/BIASstreamliningFactSheet030906.htm>> (last visited Apr 3, 2007).

³⁴ See *id.*

³⁵ *EOIR 2005 Statistical Year Book* at S2 (cited in note 25). The fiscal year runs from October 1 to September 30. The data is gathered and reported as fiscal year reports known as Statistical Year Books.

³⁶ *Id.* Yet, the BIA reports that the rate of completion is not keeping up with the rate of new receipts. More detailed analysis is required if we are to understand if the differential between the rates of receipts and the rate of completion is resulting in an increased backlog or if the rate of increase was sufficient to make a dent in what was once a many year backlog. This type of analysis was attempted by the GAO in its study of the EOIR caseload but that report did not analyze the BIA caseload. See *EOIR GAO Study* at 20–23 (cited in note 26) (examining immigration courts' case completion data).

³⁷ *EOIR 2005 Statistical Year Book* at S2 (cited in note 25). "Receipts" are the appeals

that receipts increased 14 percent from 2002–2006 and completions decreased by 12 percent in that period. The change in the relative percentage of completions is enormous: a 58 percent spread. Yet no reader of the 2006 Year Book would immediately see this difference because of the five-year reporting period.

What do these numbers tell us? To me, they raise many questions that the existing published data fail to answer. Why is there an increase in the number of people subjected to proceedings? Why is there a decrease in the number of people seeking administrative review? Further, of this smaller group seeking administrative review, why was there a spike in the number of people seeking federal court review?³⁸

Figure 4

Table Showing Rate of Appeal from IJ Orders to the BIA

<i>IJ Decisions</i>	<i>Case Appeals Received (Aliens)</i>	<i>Percent Appealed</i>
170,222	25,544	15%
197,941	33,654	17%
209,274	34,164	16%
264,792	30,469	12%
273,615	24,527	9%

Source: *EOIR 2006 Statistical Year Book* at Y1 (cited in note 4).

To answer these large questions, we must ask many smaller, specific questions about the characteristics of the individual cases and disaggregate the overall data to identify significant causal factors shaping the rate of appeal. For example, we might ask what specific grounds of removal are being used by the DHS? Are there more people charged with fraud? Are there more people charged with a ground of inadmissibility, or are a greater number being placed in proceedings rather than in summary border procedures? Are more people now subject to removal because of a criminal conviction?³⁹ Is the 103 percent increase in

from the IJ decision received by the BIA, and “completions” are the number of appeals from IJ decisions resolved by the BIA.

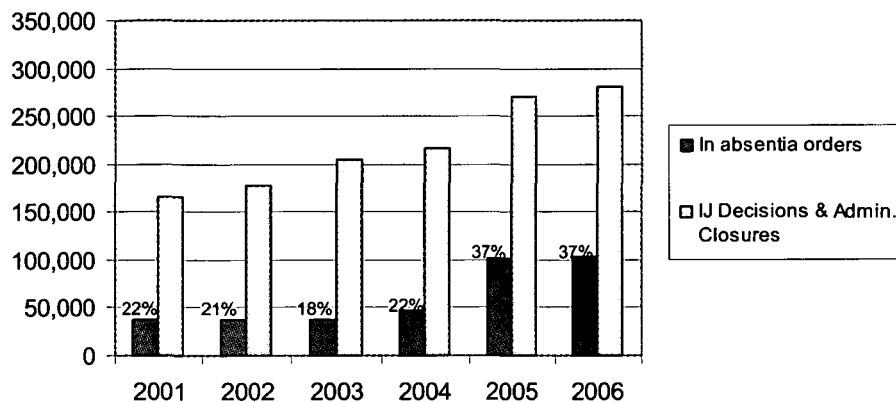
³⁸ The most recent data indicate that the rate of appeal to federal court is dropping. See the large drop in the number of 9th Circuit cases in the table provided above.

³⁹ It appears that there has been a large increase in DHS reliance on “administrative removal” under INA § 238, codified at 8 USC 1228 (2000), which is available when an individual has been convicted of an aggravated felony. See TRAC Immigration, *New Data on the Processing of Aggravated Felons*, available at <<http://trac.syr.edu/immigration/reports/175/>> (last visited Feb 22, 2007). This report, based on analyzing information secured under the Freedom of Information Act, documents a large increase in the administrative form of removal. The Department of Justice also reported on using this proce-

the entry of *in absentia* orders reflective of a shift in policy toward a less formal administrative process, away from contested administrative proceedings?⁴⁰

Figure 5

2006 In Absentia Orders as a Percentage of IJ Orders



Source: EOIR 2006 Statistical Year Book at H2 (cited in note 4).

Do rates of appeal suggest any single cause? It could be that fewer people are appealing the order of the IJ because they won. The BIA has jurisdiction to hear the appeals of either the government or the noncitizen. Is it possible that the government is appealing at a lower rate?

dure. See Department of Justice, Inspector General, *Criminal Aliens: The Removal Process*, Immigration and Naturalization Service Institutional Removal Program Appendix II (Sept 2002), available at <<http://www.usdoj.gov/oig/reports/INS/a0241/app2.htm>> (last visited Feb 22, 2007). These case numbers should not be reported within the universe of cases before the EOIR and thus should not explain the decrease in administrative appeals. For another report trying to analyze the profile of the people being removed as “aggravated felons”, see TRAC immigration, *How Often Is The Aggravated Felony Statute Used?*, available at <<http://trac.syr.edu/immigration/reports/158/>> (last visited Feb 22, 2007). The report indicates that many of the people facing removal as an “aggravated felon” have been resident in the United States for greater than fifteen years. The TRAC studies are providing valuable insight into the prosecutorial choices of the DHS and should be useful to analyzing priorities and perhaps helpful to Congress in evaluating the costs and benefits of expansive grounds of removal such as statutory expansion of the term “aggravated felony.”

⁴⁰ If the government secures an *in absentia* order, in a sense, it has bypassed a more formal proceeding because the noncitizen has failed to appear and the process becomes fairly automatic. The resulting order is a binding final order of removal. INA § 240(b)(5)(A), codified at 8 USC § 1229a(b)(5)(A). As this article was going to press, the EOIR released data for fiscal year 2006. *In absentia* orders increased from 100,994 to 102,834, but the rate of failure to appear orders remains steady at 39 percent. See EOIR 2006 Statistical Year Book at H2 (cited in note 4).

In August 2006, the GAO published a report on its investigation of the workload of the two hundred IJs and the EOIR's administrative controls and reporting systems.⁴¹ This study describes the EOIR workload, the manner in which individual cases are assigned to individual IJs, and the agency's efforts to manage its work through time-to-completion goals.⁴² The study found problems with the data as collected by the EOIR, and under their auditing principles, the GAO could not make conclusions due to the faulty or insufficient data.⁴³ But perhaps more instructive is the fact that, for eighteen months, the GAO studied the workings of the immigration courts and how the cases were completed, but spent almost no time identifying what happens to the cases administratively appealed to the BIA or to the cases remanded from the federal courts.⁴⁴ This study did not investigate beyond the IJ level.

While the study provides very useful information about the EOIR's management and performance methods, it does not explore the dynamics that contributed to those caseloads.⁴⁵ Nor did the study really seek to quantify or examine the origins of the EOIR's cases. We can read this study and not know why there was a 44 percent increase in the number of new filings, although the GAO quotes the EOIR as stating that "EOIR attributes this growth in part to enhanced border enforcement activities."⁴⁶ Nowhere in this study does the GAO or EOIR elaborate on this important issue.⁴⁷ We do not know if the government's prosecutorial priorities have changed, or why the government might use the

⁴¹ *EOIR GAO Study* (cited in note 26).

⁴² *Id.* at 22.

⁴³ *Id.* at 33. The GAO basically found that the EOIR's explanation for inconsistencies in its data and its methods of reporting could not be verified and suggested that in the future the EOIR should adopt better reporting systems. *Id.*

⁴⁴ There is one line that says that, "a case remanded from the BIA is usually assigned to the immigration judge that had initially adjudicated the case." *EOIR GAO Study* at 17 n 27 (cited in note 26).

⁴⁵ To be fair, the study was requested by Senator Charles Grassley as Chair of the Committee on Finance. The GAO described Senator Grassley's request as an inquiry into the performance of the immigration courts. The GAO included three questions: "1. In recent years, what has been the trend in immigration courts' caseload? 2. How does OCIJ assign and manage immigration court caseload? 3. How does EOIR/OCIJ evaluate the immigration courts' performance?" *Id.* at 2.

⁴⁶ *Id.*

⁴⁷ By comparing the data to the 2005 *EOIR Statistical Year Book*, I found that this phrase is probably referring to the 103 percent increase in *in absentia* orders from 47,408 in 2004 to 100,994 in 2005. See *EOIR 2005 Statistical Year Book* at H2 (cited in note 25). More than half of these orders were issued in two immigration courts, San Antonio and Harlingen, Texas. *Id.* at H1.

immigration courts to obtain an order of removal rather than informally handling the case.⁴⁸

Let us explore this more abstractly. We need to move from alchemy to science. We need to seriously identify the “right” questions before we design solutions. When we are only gathering the data from the statistical reports of the adjudicating agency, we miss important characteristics of the situation, such as the catalysts that drive the workload of the adjudicators. Without knowing the priorities and procedures of the prosecutors or understanding the responding behavior of the noncitizens and those who assist them, we cannot build a complete understanding of the adjudication process within the agency. Without examining the time periods for adjudicating cases before the BIA or examining whether the cases were originated on appeal by the noncitizen or by the Department of Homeland Security,⁴⁹ we cannot gain a complete picture of the administrative process and how it contributes to the enforcement of the immigration laws. After all, an order of removal is not final until administrative review, if sought, is complete.⁵⁰ These issues will only become more abstract when we turn to examine the workload of the federal courts reviewing the agency decisions.

III. A FIVEFOLD INCREASE IN FEDERAL COURT REVIEW OF REMOVAL ORDERS

The Office of Immigration Litigation (“OIL”) is part of the Civil Division of the Department of Justice. This office coordinates the representation of the government’s position in all of the cases seeking judicial review of removal orders. In April 2006, Peter J. Keisler, an Assistant Attorney General, asked for increased appropriations to support an expansion of OIL and to

⁴⁸ The Department of Homeland Security has statutory authority to remove some individuals without administrative court proceedings. For example, some individuals are given a right to voluntarily depart and no court proceedings are initiated. See INA § 240B, codified at 8 USC § 1229c (2000). Under INA § 238, codified at 8 USC § 1228 (2000), individuals may be subject to administrative removal due to a state or federal criminal conviction that meets the definition of “aggravated felony” as defined in INA § 101(a)(43), codified at 8 USC § 1101(a)(43) (2000). Others are subject to a form of removal known as “expedited removal” which largely eliminates the involvement of the immigration courts. See INA § 235(b), codified at 8 USC § 1225(b) (2000).

⁴⁹ Appeals to the BIA may be brought by either the individual respondent or the attorney representing the Immigration and Customs Enforcement Division of the Department of Homeland Security. These attorneys are informally referred to as “ICE trial attorneys.” As opposed to ICE, the EOIR and the BIA are not part of the Department of Homeland Security but are part of the Department of Justice.

⁵⁰ See INA § 242(d)(1), codified at 8 USC § 1252(d)(1) (2000).

support the workload of the office.⁵¹ He reported that during the past four years the rate of appeal from BIA orders had increased from 6 percent to 29 percent. The fivefold increase is further compounded by an increase in the total number of opinions issued by the BIA. The EOIR used essentially the same figures in reporting the rate of review from the BIA.⁵² Mr. Keisler reported that OIL was now handling over 17,000 cases and that each attorney in the division had an annual caseload of over 150 petitions for review.⁵³

The EOIR reports that it is transmitting the records of more than 1,000 cases per month to the courts of appeals. From a comparison of the OIL data with the reports of the federal courts on the total number of cases seeking review of administrative decisions, it appears that 90 percent of the administrative review cases are immigration-related.⁵⁴ The federal judges charged with the adjudication of these petitions for review have not been silent and have independently reported to the press and to Congress that immigration cases have become a significant proportion of their dockets. Chief Judge John Walker, Jr., of the Second Circuit Court of Appeals has testified that immigration cases make up 38 percent of his circuit's workload. Chief Judge Mary Schroeder of the Ninth Circuit Court of Appeals reported that more than 40 percent of her circuit's docket was immigration-related. In contrast, petitions for review of immigration matters make up a smaller percentage of the total workload of the Fifth, Eleventh, and Fourth Circuit.

⁵¹ See generally Statement of Peter J. Keisler (cited in note 11).

⁵² EOIR, Fact Sheet, *BIA Restructuring* (cited in note 33). EOIR reported that the rate of new petitions increased from 5 percent to 30 percent between 2002 and 2006.

⁵³ See Statement of Peter J. Keisler (cited in note 11). Mr. Keisler had reported that the traditional caseload was sixty cases a year per attorney in the division. The Office of Immigration Litigation has been assigning cases to assistant U.S. attorneys throughout the United States so the actual caseload of OIL attorneys is unclear. It is clear that many inexperienced government attorneys are now being assigned to these cases.

⁵⁴ The Administrative Office of the Federal Courts does report a total number of BIA cases pending in all circuits. In 2005, there were 13,713 administrative appeals *commenced* in the courts of appeals; of these, 12,349 were from the BIA. This means in 2005, BIA appeals represented 90 percent of the administrative appeals *commenced* in the courts of appeals. See Mecham, *2005 Annual Report* at 114 Table B-3 (cited in note 12). The numbers did not dramatically change the overall percentage in fiscal year 2006; however, the Ninth Circuit reported a drop of 721 cases which reflects an 11 percent decline. Duff, *2006 Annual Report* at 119 Table B-3 (cited in note 4).

IV. WHAT MERCURY GENERATES THE INCREASE IN THE RATE OF JUDICIAL REVIEW?

What might explain a fivefold increase in the number of people seeking judicial review of removal orders from 2002 to 2005? While I am hesitant to present a long list of queries, inadequate Congressional hearings and proposed legislation force me to pose these critical questions. As I have tried to make clear, without the proper investigation we may be unable to understand the dynamics in the system and accordingly cannot solve the problems. The critical questions are: Was there a change in the substantive law? Was there a change in the BIA's reasoning? Was there a change in the quality of representation of noncitizens in immigration proceedings? Were more people able to secure pro bono counsel? Was there a change in the rulings of the courts that inspired more people to seek judicial review? Does seeking review provide any side benefits to the litigants? Does the rate of review correlate with the rate of reversal in the circuit? Is the rate of review proportional to the volume of cases heard within that circuit? Are the contents of the petitions for review similar or do some circuits have more appeals concerning asylum while others have more appeals contesting a statutory interpretation of a ground of removal?

Again, most of these questions were not presented in recent Congressional hearings; nor are they part of the investigatory mandate the Senate bill directs to the GAO. In a prior exploration of this topic, I examined some of the questions and began to answer them.⁵⁵ I have not conducted the detailed empirical work that would be necessary to substantiate these claims. Still, my preliminary investigations lead me to suggest that the largest contributing factor in the increase in judicial review is a growth in the number of private attorneys willing to prepare a petition for review. Attorneys are willing to take on these challenges to the administrative review process, despite the narrow scope of review and the significant legal issues that are precluded from review. Until 1996, many of the immigration appeals reviewed

⁵⁵ Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 NY L Sch L Rev 37 (2006/7). For a perspective which differs dramatically from mine, see Michael M. Hethmon, *Tsunami Watch on the Coast of Bohemia: The BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 Cath U L Rev 999, 1001 (2006) (arguing that the agency's streamlining regulations have resolved the workload problem at that level, and that the federal courts are now faced with their own "administrative crisis").

the denial of relief to a noncitizen under an "abuse of discretion standard."⁵⁶ In 1996, Congress foreclosed direct review for abuse of discretion, and yet the caseload continues to grow. Attorneys now focus on challenges to the sufficiency of the record and the statutory interpretation of eligibility for removal or for relief.

Judge Jon Newman of the Second Circuit reported that the vast majority of the petitions for review in the Second Circuit concerned asylum claims.⁵⁷ Similar characterizations have been supported by the empirical studies of John R.B. Palmer.⁵⁸ Chief Judge Mary Schroeder has not reported a similar concentration in the Ninth Circuit. OIL handles all of the litigation but has not released information regarding the noncitizens' countries of nationality or the nature of the claims being adjudicated in the federal courts. OIL representatives have testified that the overall rate of affirmance of the BIA's orders of removal is 90 percent.⁵⁹

Another apparent factor in the rate of judicial review is the role of the government attorneys in prosecuting removal cases. If the government seeks to deport an individual from a country with known political turmoil or high rates of asylum applicants, or if the government chooses to seek removal of a long-term resident because of a criminal conviction, it is likely that the noncitizen will be motivated to fight his or her removal. Congress has preserved avenues of relief from removal for many of these individuals. Many critics of the removal system have wondered about the failure to impose limits, such as statutes of limitations, on

⁵⁶ See Peter Schuck and Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 Stan L Rev 115, 155 (1992) (discussing the prevalence of "pattern or practice of abuse" lawsuits); Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 NY L Sch L Rev 161, 167-80 (2006/7) (tracing the historical tension between "discretion" and "authority" in immigration law).

⁵⁷ Immigration Litigation Reduction, Hearing before the Subcommittee on the Judiciary, 109th Cong, 2d Sess 4 (2006) (statement of Jon Newman, Circuit Judge, US Court of Appeals for the 2d Circuit), available at <http://judiciary.senate.gov/testimony.cfm?id=1845&wit_id=5211> (last visited May 10, 2007).

⁵⁸ See John R.B. Palmer, *The Second Circuit's "New Asylum Seekers": Responses to an Expanded Immigration Docket*, 55 Cath U L Rev 965 (2006) (discussing the Second Circuit's response to the dramatic increase in its immigration-related caseload); John R.B. Palmer, Steven W. Yale-Loehr, and Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 Georgetown Immig L J 1 (2005).

⁵⁹ Statement of Peter J. Keisler (cited in note 11). Mr. Keisler stated the success rate was about 90 percent in response to a question after his formal statement was given. The transcript for the hearing is available at <http://commdocs.house.gov/committees/judiciary/hju27226.000/hju27226_Of.htm> (last visited June 5, 2007).

the ability of the government to seek removal and have proposed bars to retroactivity and formal limits.⁶⁰

Beyond the failure to use prosecutorial discretion, another major contributor to the growing workload is the failure of the government attorneys and the IJs to identify and correct problems in the administrative process. This failure is undoubtedly due to individual workload pressures, but should not be ignored.⁶¹ John R.B. Palmer has similarly observed and reported on a change in attorney behavior.⁶² Obviously, these questions require detailed examination of case records and interviews with the attorneys for the conclusions to be more fully developed, but in none of the current government studies have I seen a focus on the motivations and reasoning of the key actors: the attorneys. Without examining these “dynamic forces” in the system, our assessments are bound to be incomplete and static.

Failure in the administrative process is also due to a lack of institutional capacity to learn from the errors of the adjudication process identified during judicial review. In 2006, for the first time, the EOIR identified the number of cases remanded to the agency after federal court review. In the 2005 Statistical Year Book, the BIA reports that of the 42,734 orders handled by the agency, 1,308 were handled following remand from the federal courts. The report provides no additional detail about what type of cases were remanded; nor was any ground for remand identi-

⁶⁰ See, for example, Margaret H. Taylor and Alexander Aleinikoff, *Deportation of Criminal Aliens: A Geopolitical Perspective*, Washington DC (Inter-American Dialogue, 1998); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 NYU L Rev 97, 157 (1998) (arguing for limitations on retroactive application); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 Admin L Rev 305, 337–45 (2000) (examining the legal effects of conceptualizing deportation as “punishment”); Bill O. Hing, *Detention to Deportation: Rethinking Removal of Cambodian Refugees*, 38 UC Davis L Rev 891, 957–69 (2005) (critiquing under principles of relational justice the expulsion of Cambodian refugees after lifetime residences in the United States). See also Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (Oxford, 2006), for a discussion of the legal development of the concept of permanent residence and how that status became more vulnerable to termination.

⁶¹ In a recently published article, Judge John T. Noonan of the Ninth Circuit Court of Appeals illustrates this issue very clearly by including excerpts from the administrative hearing transcripts where both the Immigration Judge and the government attorney are driven to meet production goals that result in error in the administrative process. See John T. Noonan, *Symposium on Immigration Appeals and Judicial Review: Immigration Law 2006*, 55 Cath U L Rev 905, 907–12 (2006). Judge Noonan also observes that the government generally fails to exercise discretion regarding the appeal or defense of immigration decisions. *Id.* at 913.

⁶² See John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 NY L Sch L Rev 13, 26–32 (2006–2007) (discussing the potential causes for this shift in attorney behavior).

fied. In a prior paper, I interviewed some internal staff of the BIA who stated that there was no formal reporting system to the staff attorneys about the nature or reason for the remands.⁶³ Unless one of the hundred-plus staff attorneys happened to be reassigned to the remanded case or the case was selected for discussion by the administration, there was no direct communication between the federal court and the individuals most responsible for the administrative order. Of course, we might assume that all eleven Members of the BIA read the 1,308 remanded cases, but that would be a great burden given their large workloads and their rates of production.⁶⁴

In October of 2005, the Second Circuit increased its monthly production of opinions in asylum cases. In March of 2006, the Second Circuit began to name the individual IJs in the upper right-hand corner of the slip opinion filed on the court website.⁶⁵ Moreover, more opinions began to name the particular IJ.⁶⁶ This is a stark break from a long tradition in judicial review of immigration agency decisions, yet a welcome one in my view. Not only does this change result in greater transparency with respect to the adjudication process as a whole, but it facilitates feedback and may aid in evaluating IJ performance.⁶⁷

V. WHAT (OR WHO) MIGHT BE CONTRIBUTING TO THE PHENOMENON?

The EOIR requires attorneys and accredited representatives to file a notice of appearance with the IJ and in BIA proceedings. Accordingly, the agency now reports the percentage of cases involving noncitizens with representation.⁶⁸ The federal courts

⁶³ Benson, 51 NY L Sch L Rev at 63 (cited in note 55).

⁶⁴ It is not clear how many of the 1,308 cases were remanded after judicial opinion and what number were remanded with the stipulated consent of the government counsel. In past studies, analysts have found a high rate of remand by stipulation. See Benson, 51 NY L Sch L Rev at 61–62 (cited in note 55) (citing City Bar Association study reporting that 60 percent of Second Circuit appeals that were conferenced were settled or remanded).

⁶⁵ Email from Elizabeth Cronin, Staff Attorney at the Second Circuit, to author (Feb 7, 2007) (on file with author).

⁶⁶ See, for example, *Wang v Attorney General*, 423 F3d 260 (3d Cir 2005). This case and others are discussed in Christine B. LaBrie, *Third Circuit Describes "Disturbing Pattern of IJ Misconduct" In Asylum Cases*, Immig Daily, available at <<http://www.ilw.com/articles/2005,1027-labrie.shtm>> (last visited May 10, 2007).

⁶⁷ The practice of naming IJs on Second Circuit opinions originated from a suggestion from some IJs who wanted to read the orders and link them to their cases. See Cronin (cited in note 65).

⁶⁸ In 2004, 45 percent of individuals in removal proceedings were represented by

similarly require formal entry of appearance and have electronic databases that would permit analysis of who is representing the noncitizens in the immigration cases. Further empirical study should be possible to correlate the data and allow an assessment of who is representing the noncitizens at the various stages.

In the Second Circuit, in an effort to understand the nature of the surge in immigration appeals, court staff analyzed a sample of the BIA cases before the court and found that most concerned asylum claims.⁶⁹ They reported that most of these involved noncitizens challenging the decision of the agency by arguing that the decision was not supported by “substantial evidence.” According to Judge Jon Newman, few of the cases were presenting novel legal issues such as the nature of “persecution” covered by the statutory refugee protections; rather, the vast majority of cases involved a challenge to the IJ’s credibility finding.⁷⁰ This analysis similarly found that a small number of attorneys represented the majority of the petitioners.⁷¹ I do not have access to the exact numbers, but in a few meetings, the court personnel suggested that twenty or thirty attorneys represented more than half of the forty-eight hundred pending cases. I interviewed several of the high-volume filers. Many responded that they had more than 150 cases pending in the Second Circuit and in various stages of briefing. When I asked these attorneys how they could handle the volume, they reported that most of the cases presented the same legal issues and that the bulk of their time was spent combing the factual records for errors and lapses in the findings of the IJ that might lead to a remand for more specific findings.⁷² Several of these attorneys reported that they won about half of their appeals, and therefore they encouraged clients to pursue federal court review.

My investigation of attorneys appearing in the Second Circuit was limited. I interviewed fewer than fifteen, and the Second Circuit has not published detailed statistics concerning its own caseload or the specifics of attorney representation. We need

counsel; in 2005, only 35 percent were represented. *EOIR 2005 Statistical Year Book* at G1 (cited in note 25).

⁶⁹ Palmer, Yale-Loehr and Cronin, 20 *Georgetown Immig L J* at 71–73 (cited in note 58).

⁷⁰ Immigration Litigation Reduction (statement of Jon Newman) at 10 (cited in note 57).

⁷¹ See data gathered by John R.B. Palmer. Palmer, 51 *NY L Sch L Rev* at 31 (cited in note 62).

⁷² Notes of the emails and phone interviews, all of which were conducted in the fall of 2005, are on file with the author.

more information about the motivation and experiences of the attorneys on both sides of the litigation before we reach conclusions about the expectations of the litigants.

VI. DO WE NEED TO TRANSMUTE THIS LEADEN SYSTEM INTO A GOLDEN ONE?

As discussed in the introduction, I am skeptical about the need to transform the judicial review of immigration cases. To extend the metaphor, it might indeed be possible to transmute lead into gold by exerting vast amounts of energy to strip electrons from the atoms of lead, but the cost of that stripping would outpace the economic value of the gold produced. Is there even anything fundamentally wrong with our current system of judicial review that justifies expending such energy? As we should desire a valuable end product—a just and effective immigration system—we should be looking to reform the agency adjudication system instead.

Again, we need to evaluate in a larger context. As I mentioned above, one analysis of immigration enforcement did not mention judicial review as an obstacle to government enforcement.⁷³ One way we might evaluate whether the immigration system is producing too many appeals is to compare it to the rates of appeal in other administrative law systems. While there is no easy or direct comparison of systems that would contain all the same variables, I found some basic comparisons helpful in answering the question of whether the immigration caseload is really out of line.

In a recent comprehensive study of the judicial review of Social Security claims, Paul Verkuil and Jeffrey Lubbers reported that the number of Social Security claims subjected to judicial review was increasing and could be expected to continue increasing due to the aging population and other factors.⁷⁴ This study provides a good model of issues to consider in selecting the forum

⁷³ See Department of Justice, Inspector General, *The Immigration* (cited in note 9). Further, as I have explained in some depth in other papers, the current statute does not preclude removal of the individual after an administratively final removal order, rather in many districts it is government policy to wait for the exhaustion of judicial review rather than a statutory mandate that the government wait. See Benson, 51 NY L Sch L Rev at 68–70 (cited in note 55).

⁷⁴ Paul R. Verkuil and Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 Admin L Rev 731, 733–34 (2003). This article was based on a study commissioned by the Social Security Advisory Board. Although that study did not review the administrative process directly it was clearly prepared with a strong understanding of the practice and procedures of the administrative study.

and structure of judicial review. While the two administrative systems have many distinctions, for now, let's compare a few apples and oranges.

The Social Security system handled approximately 507,010 claims in fiscal year 2000 and, in that same year, the agency completed administrative review of approximately 100,950 cases. In fiscal year 2001, the federal district courts heard 12,464 Social Security cases.⁷⁵ In that same year, immigration cases numbered 1,760 and the rate of appeal would have been lower than the Social Security appeals.⁷⁶ Today, the rate of immigration appeals is higher. Neither system underwent major structural changes during this time period, so why are the rates of appeal advancing in immigration but not in the Social Security system? This one comparison alone suggests that it is not the structure and form of judicial review that drives the rate of appeal and suggests even greater reason for Congress to pause before reforming the current system.

As noted above, it may be that noncitizens seek review because they have so much at stake. Without knowing more about the rate of successful appeals, it is unclear if they are motivated by reality. There are no published data reporting on the rates of remand in each of the circuit courts of appeals.⁷⁷ The Social Security Administration has traditionally been reversed by the district courts in nearly half of the cases.⁷⁸ This rate of reversal might sustain a high rate of appeal. We can speculate about motive—the government argues delay of removal, the attorneys may argue vindication of statutory and procedural rights that have high stakes due to the collateral consequences of removal—but without a study of the cases, we are only speculating. To take corrective action, we need to identify the problem.

⁷⁵ Obviously there is not a direct line here. A case could be heard by the social security administration and take more than a year to work through the administrative system.

⁷⁶ Mecham, *2005 Annual Report* at 114 Table B-3 (cited in note 12).

⁷⁷ While there are different rough estimates of current remand (meaning at least a partial victory for the noncitizen) the rates in some circuits are between 17 percent and 40 percent. Chief Judge John Walker of the Second Circuit Court of Appeals testified that the remand rate in that circuit is 20 percent. Immigration Litigation Reduction (statement of John M. Walker) at 5 (cited in note 13). See also Riki King, *Ten Things I Wish I Knew Before Filing a Petition for Review in the Second Circuit* (May 14, 2006) (unpublished paper) (on file with author). Judge Richard Posner of the Seventh Circuit Court of Appeals has stated that the remand rate for immigration cases in that circuit is 40 percent. Letter from Richard A. Posner, Circuit Judge, United States Court of Appeals for the Seventh Circuit, to Richard J. Durbin, United States Senator (Mar 15, 2006).

⁷⁸ Verkuil and Lubbers, 55 Admin L Rev at 741 (cited in note 74).

Perhaps it is the agencies I chose, but it appears by the rough comparison that while there is a higher rate of immigration appeals in the most recent year, the Social Security Administration has faced a much higher rate of appeal in past years. We can examine another agency, one also studied in the Verkuil and Lubbers report, the Veterans Benefits system. In that system, regional offices decided 598,500 decisions on disability compensation in 2004, and after a regional appeals process, about 38,600 applicants submitted formal administrative appeals to the Board of Veteran's Appeals ("BVA").⁷⁹ In 2004, the BVA remanded about 58 percent of those cases back to the regional offices to be reworked, and affirmed the denial of all benefits in 23 percent of the cases.⁸⁰ Given this high remand rate and relatively low denial rate, it is not particularly surprising that only 2,234 cases were appealed from the BVA to the U.S. Court of Appeals for Veterans' Claims.⁸¹ The rate of remand from the BVA may indicate that judicial review is less often necessary because errors are caught at the administrative level. The new increase in judicial review of immigration decisions may reflect a temporary swell or longer-term movement towards a rate similar to other benefits agencies. Certainly, a deeper inquiry into the forms of review, the legal issues presented for review, and the internal remands from the administrative level might provide a more contextualized assessment of the relative merits of the immigration system.

Further, judicial review may have its own efficiency value when it is evaluated in context. For example, in the past few years the Supreme Court has decided a number of cases interpreting the statutory definition of "aggravated felony."⁸² Remov-

⁷⁹ GAO, *VA Disability Benefits: Board of Veterans' Appeals has Made Improvements in Quality Assurance, but Challenges Remain for VA in Assuring Consistency* 3 (statement of Cynthia A Bascetta) (May 5, 2005), available at <<http://www.gao.gov/new.items/d05655t.pdf>> (last visited Feb 25, 2007).

⁸⁰ *Id.* at 5.

⁸¹ United States Court of Appeals for Veterans' Claims, *Annual Report*, available at <http://www.vetapp.uscourts.gov/documents/Annual_Reports.pdf> (last visited Feb 25, 2007).

⁸² See INA § 101(a)(43), codified at 8 USC § 1101(a)(43) (2000). See, for example, *Gonzales v Duenas-Alvarez*, 127 S Ct 815 (2007) (allowing removal of an alien for a theft offense for which term of imprisonment is over one year); *Lopez v Gonzales*, 127 S Ct 625 (2006) (Mere possession of narcotics does not rise to the level of illicit trafficking which would classify as an aggravated felony.); *Leocal v Ashcroft*, 543 US 1 (2004) (Negligent operation of a motor vehicle was found not to trigger § 1101 because the statute contemplates violent crimes that require a greater intent.). The Supreme Court has also recognized that many cases regarding aggravated felonies are affected by these decisions; for example, the Court has granted certiorari in order to remand multiple cases in light of

ing criminal aliens is a top priority of both Congress and the agencies charged with enforcing the immigration laws; unfortunately, Congress has attempted to direct the agencies with the rough term of art "aggravated felony." While the government may at times believe the statute is clear, in truth, it requires a great deal of interpretation. If an individual meets the threshold of having been convicted of an "aggravated felony," the consequences for the agency's enforcement approach are dramatic. In some cases, the statute authorizes, and the agency may seek, a form of administrative removal that bypasses the immigration courts altogether.⁸³ This type of removal order represents a majority of all removal orders, yet these administrative removals, which do not even involve an IJ, do not appear to be part of the contemporary debate on the immigration caseload. This is an unexplored body of cases, whose gravitational impact on the total caseload is unknown and unexplored. Another consequence of administrative removal is the preclusion of most avenues of relief from removal. Judicial review in this area, as well as a clearer statute, would allow for more predictability of immigration consequences. Many individuals seek neither administrative review nor judicial review because the aggravated felony conviction has eliminated relief.

Even when judicial review is performed by the circuit courts of appeals rather than the Supreme Court, there are benefits such as greater clarity in the changing strategies of the agency prosecutors, the procedural behaviors of the IJs, and the institutional reforms of the administrative process. When courts refine the interpretive tools for applying statutes and implementing procedures, they provide guidance to the agency prosecutors and to the administrative officials. This conversation between the courts and the agencies can help answer the open questions and thus help the system operate more effectively.

Lopez. See, for example, *Tostado-Tostado v Carlson*, 127 S Ct 936 (2007); *Riascos-Cuenu v United States*, 127 S Ct 827 (2006); *Prones v United States*, 127 S Ct 826 (2006).

⁸³ See INA § 238, codified at 8 USC § 1228 (2000) (expedited removal of aliens convicted of aggravated felonies). One recent report noted that in 2002, 43 percent of all removal orders were issued administratively, as opposed to by an immigration judge. By 2006, approximately 55 percent of all removal orders were administrative orders. See TRAC Immigration, *New Data on the Processing of Aggravated Felons*, available at <<http://trac.syr.edu/immigration/reports/175/>> (last visited Feb 22, 2007). INA § 238 theoretically preserves the right to judicial review, by requiring the government to wait 14 days before executing a final order of removal in order to allow the alien to seek review under INA § 242, codified at 8 USC § 1252 (2000). However, it appears that there are relatively few appeals of removal orders issued under INA § 238.

Of course, judicial review, while refining precision and predictability in statutory interpretation, does not necessarily mean that the collateral consequences will always be a net efficiency. A single judicial opinion may have collateral effects in both directions. For some individuals, it will mean a streamlined removal, while for others, it will mean that attorneys will have to take the case all the way to the judicial review stage in order to refine the statutory application or to distinguish the existing precedent. Rather than Congress focusing on the availability and form of judicial review, this single example suggests to me that a systemic study of the impact of the concept of "bright line" categories such as "aggravated felony" on the agencies' enforcement efforts would be a more effective way to evaluate how to reach Congressional goals. Suppose Congress had introduced the concept of "aggravated felony," not as a bar to relief from removal, but as a factor for the agency to consider when determining whether to seek removal and for the IJs to consider as a factor in a totality of circumstances approach to relief from removal. It is possible that the government might not initiate a case when the noncitizen is highly motivated to litigate given the equities of that person's circumstances, or when the IJ's decision might be more difficult to overturn because of the current statutory preclusion barring judicial review of many discretionary exercises.

It is not judicial review that is really interfering with the operation of the system, but as judicial review is and must be part of the system,⁸⁴ judicial review needs to be carefully assessed to understand how it affects performance within the dynamics of the system.

VII. TO FIND THE DYNAMIC FORCES—EVALUATE THE SYSTEM, NOT MERELY THE COMPONENTS

Several of the past studies concerning the immigration removal system provide significant details about its component

⁸⁴ At times Congress has tried to eliminate all judicial review of categories of immigration decisions. These attempts have largely not succeeded in the sense that there are more cases in the courts than ever before, but they also have not succeeded because there are too many legitimate strategies and constitutionally mandated forms of review to really ever eliminate the role of the courts. See Benson, 29 Conn L Rev at 1484–94 (cited in note 7); Morawetz, 51 NY L Sch L Rev at 120–9 (cited in note 7); Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 NY L Sch L Rev 133, 142–53 (2006/7). More importantly, government enforcement frequently benefits from the clarifying role of judicial review and it would be foolish to assume that the system might be more responsive to congressional values if judicial review were not part of the total system.

parts but few insights about the interactions of these components. For example, in spring 2006, the GAO completed an eighteen-month study of the EOIR's operations.⁸⁵ This study does not inquire into the government's prosecutorial priorities with respect to initiating these proceedings; nor does it look at the remand rates after administrative or judicial review of IJ decisions.⁸⁶ Similarly, the Attorney General, responding to judicial and public criticism of the operations of the immigration courts, ordered an internal review of the operations of the EOIR and the BIA.⁸⁷ This internal review resulted in new recommendations for evaluating the performance of the IJs and in proposals for greater flexibility in the appointment of BIA Members.⁸⁸ As this review was, by design, internal to the Department of Justice, it did not evaluate the interactions with the Department of Homeland Security, which initiates the removal proceedings; nor did the study evaluate the impact of judicial review on rates of remand or on decisions of OIL or other attorneys within the Department of Justice to stipulate to remand. These isolated evaluations are informative but not diagnostic.

It falls to Congress to think beyond the parochial concerns of a particular agency and to the interactions of the various actors and institutions. Unfortunately, Congress appears willing to continue taking a linear or narrow approach to analyzing the issues. In spring 2006, the Senate passed legislation instructing the GAO to study the increasing rate of judicial review. As is frequently the case, the legislation identified several questions and, unfortunately, the narrow form of the questions is an example of the wrong approach to understanding the role of judicial review in immigration removal proceedings. The GAO and other governmental auditing institutions are limited by budgetary resources, political constraints, and the Generally Accepted Governmental Accounting Standards to perform the audit re-

⁸⁵ For their results, see *EOIR GAO Study* (cited in note 26).

⁸⁶ The study was prepared in response to a query from the Senate Finance Committee and the study faults internal reporting systems of the courts which make evaluation of the overall performance of the court system difficult.

⁸⁷ Gonzales's recommendations/press release is available at <http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html> (last visited Feb 27, 2007). See also Nina Bernstein, *Immigration Judges Facing Yearly Performance Reviews*, NY Times Section A14 (Aug 10, 2006).

⁸⁸ See Board of Immigration Appeals: Composition of Board and Temporary Board Members, Interim Rule with Request for Comments, 71 Fed Reg 70855 (2006) (providing these recommendations).

quested.⁸⁹ The form of the study mandated by that legislation is the equivalent of Newton hunting for the mercury to shape lead into gold. While we need to know more about the content and form of the elements that comprise the immigration removal system, without also assessing the forces that work upon those elements, we won't fully understand the dynamics of the system and will likely waste significant energy in a transmutation process that will fail or miss the mark. A two-dimensional description of the numbers and volume without comparative analysis and assessment of contributing forces is inherently insufficient and clumsy. It becomes very hard to get "there" when we don't know more about the "here."

Here is an excerpt from the legislation⁹⁰ describing the GAO study:

SEC. 707. GAO STUDY ON THE APPELLATE
PROCESS FOR IMMIGRATION APPEALS.

(a) In General. The Comptroller General of the United States shall, not later than 180 days after enactment of this Act, conduct a study on the appellate process for immigration appeals.

(b) Requirements. In conducting the study under subsection (a), the Comptroller General shall consider the possibility of consolidating all appeals from the Board of Immigration Appeals and habeas corpus petitions in immigration cases into 1 United States Court of Appeals, by—

(1) consolidating all such appeals into an existing circuit court, such as the United States Court of Appeals for the Federal Circuit;

⁸⁹ See Government Auditing Standards, GAO-07-126G, available at <<http://www.gao.gov/govaud/d07162g.pdf>> (last visited Feb 27, 2007). This book is sometimes referred to as the GAGAS or the Yellowbook. In particular examine the standards for performance audits found in Chapter 7 of the Yellowbook. While these standards do not directly suggest the type of dynamic or systemic analysis I am describing, there are aspects of the performance audit standards that indicate that the auditors should try to identify obstacles to performance and make recommendations for improving performance. They also suggest that the audit itself should involve a dialogue between the auditors and internal agency experts and external experts or constituencies engaged in the work of the agencies. See, for example, Standards 1.25-1.32 defining performance audits.

⁹⁰ S 2611 § 701, 109th Cong, 2d Sess (Apr 7, 2006).

(2) consolidating all such appeals into a centralized appellate court consisting of active circuit court judges temporarily assigned from the various circuits, in a manner similar to the Foreign Intelligence Surveillance Court or the Temporary Emergency Court of Appeals; or

(3) implementing a mechanism by which a panel of active circuit court judges shall have the authority to reassign such appeals from circuits with relatively high caseloads to circuits with relatively low caseloads.

(c) *Factors To Consider.* In conducting the study under subsection (a), the Comptroller General, in consultation with the Attorney General, the Secretary, and the Judicial Conference of the United States, shall consider—

(1) the resources needed for each alternative, including judges, attorneys and other support staff, case management techniques including technological requirements, physical infrastructure, and other procedural and logistical issues as appropriate;

(2) the impact of each plan on various circuits, including their caseload in general and caseload per panel;

(3) the possibility of utilizing case management techniques to reduce the impact of any consolidation option, such as requiring certificates of reviewability, similar to procedures for habeas and existing summary dismissal procedures in local rules of the courts of appeals;

(4) the effect of reforms in this Act on the ability of the circuit courts to adjudicate such appeals;

(5) potential impact, if any, on litigants; and

(6) other reforms to improve adjudication of immigration matters, including appellate review of motions to reopen and reconsider, and attorney fee

awards with respect to review of final orders of removal.

Even a casual reader of this legislation can see that the study commissioned is predetermined to focus on the functioning of the courts and how to channel cases once they are in the judicial review system, rather than an assessment of the charging process, administrative hearings, or internal administrative review procedures.⁹¹

Unfortunately, there is a long history of requesting narrow studies from the GAO. A review of the GAO's online database for all reports and testimony that included the term "immigration" in the subject, title, or abstract returned 477 results.⁹² Despite the vast number of studies and amount of information compiled, each study has addressed a narrow issue such as missing alien files,⁹³ border security and the visa waiver program,⁹⁴ deaths at the border,⁹⁵ information technology infrastructure,⁹⁶ or control of benefit fraud.⁹⁷ The GAO has the power to interview agency

⁹¹ As this article was being finalized, a new comprehensive immigration reform bill was introduced into the House of Representatives. See Security Through Regularized Immigration and a Vibrant Economy (STRIVE) Act of 2007, HR 1645, 110th Cong, 1st Sess (Mar 22, 2007). This bipartisan bill called the "Strive Act" contains a similar provision mandating a study of the "appellate process", however, the bill selects the Federal Judicial Center as the investigator, not the GAO. Strive Act § 703(a). The Federal Judicial Center is a government agency designed to "promote improvements in judicial administration in the courts of the United States." Federal Judicial Center homepage, available online at <<http://www.fjc.gov/>> (last visited June 6, 2007). While the Federal Judicial Center may be experienced in evaluating workflows in the federal courts, one of the major critiques in this paper is that unless the investigations are comprehensive and look at the many factors that are shaping the ultimate workloads of the courts, Congress is unlikely to obtain sufficient information to fully understand the nature of the problems to be solved. While other aspects of the Strive Act appear to recognize the lack of resources in the administrative adjudication system, the actual direction of the study is narrow in that the bill specifically directs the study to consider consolidation of all appellate review into a single federal court of appeals. See Strive Act § 703(b). The factors identified are nearly identical to those in the Senate bill discussed in the text above.

⁹² All GAO studies are available at <<http://www.gao.gov/docsearch/repandtest.html>> (last visited Feb 27, 2007).

⁹³ GAO, *Immigration Benefits, Additional Efforts Needed to Help Ensure Alien Files are Located When Needed* (October 2006).

⁹⁴ GAO, *Border Security, Stronger Actions Needed to Assess and Mitigate Risks of the Visa Waiver Program* (July 2006).

⁹⁵ GAO, *Illegal Immigration, Border-Crossing Deaths Have Doubled Since 1995; Border Patrol's Efforts to Prevent Deaths Have Not Been Fully Evaluated* (August 2006).

⁹⁶ GAO, *Information Technology, Immigration and Customs Enforcement is Beginning to Address Infrastructure Modernization Program Weaknesses but Key Improvements Still Needed* (July 2006).

⁹⁷ GAO, *Immigration Benefits, Additional Controls and a Sanctions Strategy Could Enhance DHS's Ability to Control Benefit Fraud* (March 2006).

officials, to examine internal data, to consult with consumers and other constituencies, to hire experts, and to closely observe administrative processes.⁹⁸ The data offered in these reports often represents the most comprehensive information gathered on any particular subject. However, these studies result in gathering vast amounts of empirical data that is useful only if the audit and assessment of the information is sufficiently broad. As previously described, in August 2006, the GAO completed an eighteen-month study of the operation of the immigration courts under the EOIR's administration.⁹⁹ The GAO gathered detailed caseload statistics, including the workload reports of the IJs and their staffs,¹⁰⁰ the number and type of pending cases,¹⁰¹ and performance evaluation methods.¹⁰² The GAO also noted the gaps in the information available to it.¹⁰³ With this information, and after consulting groups that interact with the EOIR,¹⁰⁴ the study weakly concluded that the data collection methods of the EOIR were problematic and that EOIR reports needed clarification.¹⁰⁵ Given the GAO's capacity to assemble comprehensive data, surely the GAO can conduct a more comprehensive and applied analysis of the data. Perhaps politics intervened to narrow the scope of the report, for during the last six months of the GAO study, Attorney General Gonzales ordered the Office of the Inspector General of the Department of Justice to undertake a review of the IJs' performance as well.¹⁰⁶ Perhaps knowing that the DOJ was acting internally, the GAO gracefully backed away from more concrete recommendations. Still, this study is a prime example of only examining one step in a multi-step process. Yes, the EOIR needed evaluation, but we cannot really conclude a great deal from this study. The study failed to evaluate how ad-

⁹⁸ See, for example, *EOIR GAO Study* at Appendix I (cited in note 26) (describing GAO's research methods).

⁹⁹ See *EOIR GAO Study* (cited in note 26).

¹⁰⁰ *Id.* at 6.

¹⁰¹ *Id.* at 16.

¹⁰² *Id.* at 21.

¹⁰³ See *EOIR GAO Study* at 30 (cited in note 26).

¹⁰⁴ The GAO interviewed representatives of the National Association of Immigration Judges, the American Immigration Lawyers Association and the American Bar Association, Commission on Immigration, as well as attorneys from the Office of Chief Counsel of Immigration and Customs Enforcement, and private bar attorneys. *Id.* at 6–7.

¹⁰⁵ *Id.* at 30.

¹⁰⁶ Gonzales's recommendations/press release is cited in note 87. The actual study does not appear to be publicly available, and could not be found after searching the website of the Department of Justice. Articles referring to the study all appear to cite to the press release.

ministrative or judicial review impacts the performance of the IJs and the EOIR.¹⁰⁷

Again, this appears to be a common and unfortunate occurrence in GAO studies relating to immigration. There are some good examples of broader studies commissioned by the Administrative Conference of the United States or by the GAO.¹⁰⁸ Each study seeks to answer a particular question and gather important data, but these independent studies are flawed for their failure to look at the interactions with other agencies and decision makers. They are, at best, accurate snapshots. We are missing the important factors outside the frame of the camera lens.

Rather than looking solely at the cases in the federal courts, Congress should have a clearer understanding of the entire process. In this paper, I gathered data presenting a snapshot of the total volume of cases adjudicated at the first level of the administrative stage, the administrative appeal stage, and finally judicial review. While I found no other study that had gathered this data into one place, this snapshot is only a beginning of the inquiry. Ideally, the study would differentiate key factors in the cases so that trends and problems could be evaluated. For each of the queries presented below, a study should not stop at a single level of agency adjudication, but should instead track the claims through as many levels as possible. While it might be impossible to include all cases due to limited resource or insufficient data,¹⁰⁹ at least statistically relevant samples could be selected and evaluated in an effort to understand the factors contributing to increasing rates of administrative and judicial review.¹¹⁰

¹⁰⁷ As this article is being written, the BIA has moved forward to propose new regulations authorizing changes in the appointment and use of IJs as temporary members of the BIA. See BIA: Composition of Board, Interim Rule (cited in note 88).

¹⁰⁸ See, for example, GAO, *VA Disability Benefits* (cited in note 79); GAO, *Social Security Administration, More Effort Needed to Assess Consistency of Disability Decisions* (July 2004). The Administrative Conference of the United States ("ACUS") was an independent agency that studied administrative processes. Congress stopped funding ACUS in 1995, but prior to that, ACUS commissioned several studies of the immigration adjudication system; one of the most comprehensive and deserving of replication was Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 Iowa L Rev 1297 (1986).

¹⁰⁹ The GAO has specifically critiqued the EOIR for inconsistent and incomplete recordkeeping. See *EOIR GAO Study* at 23–24 (cited in note 26).

¹¹⁰ An excellent example of this is the John R.B. Palmer study which used sampling to determine if the AWO process was a significant factor in attorneys seeking judicial review of the BIA final order. The study found that the rates of review appeared to be the same for the cases notwithstanding the nature of the review conducted at the administrative appellate level. See Palmer, Yale-Loehr and Cronin 20 Georgetown Immig L J at 6 (cited in note 58).

I hesitate to outline a better query for the GAO in this article. I believe the design of the study is important enough that Congress would be well advised to commission an analysis in an effort to shape a comprehensive study measuring the volume of and the forces behind the increase. As I have said, it is often the narrow questions asked that prevent Congress from having clearer insights into the dynamics of the process. The Department of Homeland Security and the EOIR report significant aggregate data in their annual year books. Yet the data is not correlated; nor can one look at the aggregate and draw clear conclusions about agency prosecutorial priorities, resource allocation, or obstacles to enforcement and adjudication goals. Released in the spring of 2007, the 2006 Statistical Year Book of the Executive Office for Immigration Review includes more details about the adjudication process within the immigration courts and the BIA. While I have reported aggregate numbers here, even a cursory review of the segregated data sets reported there offers fertile ground for study. For example, the BIA total caseload is 39,707, this number includes appeals from denials of visa petitions and represents more than just appeals from individual removal cases. Appeals from individual IJ orders represent 85 percent of the total BIA workload. When the reporting is based on the aggregate workload of the BIA, Congress might conclude that the rate of appeal from individual orders is less than it really is because a reader would assume the appeal rate is calculated based on 100 percent of the workload. The actual rate of appeal becomes more important when one learns that between 2005 and 2006, as I was writing this article, the rate of appeal decreased from 12 to 9 percent. (See Figure 4). One can only speculate about the reason for the changes. Perhaps more people are conceding removability and not appealing. Rather than challenging the removal order, the applicant seeks post removal waivers. While the CIS does not report the total number of waiver applications, based on my observations of attorney listserves, it appears that more people are appealing denials of waivers barring reentry or immigration to the U.S. after removal. Data concerning the adjudication of these important waivers is not handled by the immigration courts but by the CIS offices abroad and then appealed to the Administrative Appeals Office ("AAO") of the CIS. I contacted the AAO and they do maintain these data but they are not published in the DHS Immigration Statistics.

Perhaps the decrease in the rate of appeal from IJ orders from 12 to 9 percent may, in part, be due to the fact that a higher

percentage of the total orders issued by IJs are issued *in absentia*. In 2004, *in absentia* order represented 47,407 of the total of 302,049, or 15.6 percent; in 2005, *in absentia* orders represented 100,994 of the total of 352,869, or 28.6 percent; and in 2006, *in absentia* orders represented 102,834 of the total of 365,851, or 28 percent. See Figure 5 for data comparing *in absentia* orders to total removal proceedings. People subject to an *in absentia* order may not know they have been ordered removed and that could be their reason for not filing appeals. Without a regression analysis to determine which of the cases are being appealed, no easy conclusions can be drawn about why appeal rates to the BIA have decreased. In my view, many of these cases will become the future workload of the EOIR as people file Motions to Reopen to try to set aside the *in absentia* orders.

These comments may be obvious; any policy change has to be based on careful examination of the total pool of orders. Yet I raise these queries and concerns because in recent years the testimony to Congress and the evaluative reports of the GAO do not appear to be looking beyond the surface.

The empirical inquiries need to be much more sophisticated than simply counting the number of cases initiated in the administrative courts, the number of appeals to the BIA, the number of appeals of BIA orders, and the remand rates. While the aggregate data show that the workloads are increasing, this does little to clarify which factors are having direct impact on the size and fairness of the entire process. Accordingly, I offer these suggestions for some minimal data that should be included in a GAO or commissioned study:

1. Where the case was initiated by the Department of Homeland Security ("DHS") and by which division of the DHS;¹¹¹
2. The identity of the individual IJ and the counsel representing both the Immigration and Customs Enforcement agency ("ICE") and the noncitizen.¹¹² It is even more im-

¹¹¹ This is quite complex in and of itself. Cases can begin at the border, after enforcement actions such as workplace searches, after criminal process including arrests of non-citizens that were referred to the DHS, after applications for benefits such as seeking asylum or permanent residence via adjustment of status and even at the point an individual seeks naturalization. All of these different types of cases are treated as value-neutral and equal in the workload of the agency.

¹¹² These data too might reveal patterns of behavior that help reveal patterns of inefficiency, and can help the administrator respond appropriately. In a sense this might be a

portant to identify those noncitizens who are not represented.

3. Key characteristics of the individual in removal proceedings including:

- Status, in other words, citizenship, lawful permanent resident, nonimmigrant, over-stay, entry without inspection,
- Age of respondent and whether dependent family members are also charged with removal,
- Length of residence in the U.S.;

4. The specific grounds for removal asserted by the agency;¹¹³

5. Forms of relief sought;

6. Use of translators and languages;¹¹⁴

7. Length of administrative process and judicial review process;

8. Use of detention or bonds and at what stage in the process;

9. Judicial stays of removal; and

10. Execution of orders or subsequent deferred action by the agency.¹¹⁵

way of finding the few bad apples that are spoiling the barrel. Without these data we can't know if it is a few bad apples or if instead it is a species-wide issue. These data, while voluminous, would also help to begin analysis of situations where individuals are abusing the system or engaging in unprofessional or unethical conduct. Approval or denial rates alone fire the imagination but can't be substitutes for assessment of performance. See TRAC Immigration, Facts and Figures, available at <<http://trac.syr.edu/immigration/facts/>> (last visited Feb 24, 2007).

¹¹³ The DHS reports on the executed orders of removal and describes the "grounds" but it does not indicate when there might have been multiple grounds of removal and the data are presented as aggregate totals. See *2005 Statistical Yearbook of the Department of Homeland Security*, Table 40 (2006) ("DHS Statistical Table"), available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf> (last visited Feb 27, 2007).

¹¹⁴ The *EOIR 2006 Statistical Year Book* does report on the use of translators in cases. *EOIR 2006 Statistical Year Book* at F1 (cited in note 4). See page F1 reporting a list of languages used and the number of matters. Yet these data in isolation do not reveal whether these particular cases are more or less likely to be appealed or to have private counsel, etc.

While gathering this empirical data alone will not directly explain the causes of the increase in judicial review of immigration orders, the data will enable analysts to look at the interaction of the factors and may aid in identifying factors in the process that have the greatest effect on the entire system. The next section of this article elaborates further on why we need to measure these factors and more importantly to assess their interactions.

VIII. MEASURE THE INTERACTIONS AND VARIABLES AS THEY PLAY UPON EACH OTHER

Certainly, if the agencies began to retain these data and regularly report them, they would still require analysis. Such analysis is required to see how the individual sets of data interact and to discern the patterns within the sets.

I can imagine dozens of significant queries that would help identify the major “movers” in the systems. Does the exercise of prosecutorial discretion drive the system workloads, or does it prevent more cases from entering the system? Are the grounds of removal and agency perception of Congressional priorities prime motivators in the initiation and prosecution of cases? What role do national security concerns play in the removal system? Is the system dysfunctional because of a lack of resources for the administrative hearings? What are the characteristics and frequency of attorney error in the system? What are the common IJ and BIA errors, and how could they be reduced or eliminated? What procedures do the Courts of Appeals use to identify important immigration cases presenting novel or complex issues? Which procedures help the Courts of Appeals manage the caseload, and which ones delay adjudication? Are the results in a case predictable based on the circuit, the panel of judges, the attorney representing either party, the lack of counsel, etc.? I hope you see the point. We need the data, but even more we need ac-

¹¹⁵ The DHS will sometimes prosecute a case to a final order of removal knowing that the agency cannot or is unlikely to actually execute on the order. The reasons for this may vary, and can include lack of cooperation from the home country, lack of funds to collect the individuals, or inability to pay for their removal. See Siskin, *Immigration Enforcement* at 10 (cited in note 5). Again, the DHS does report aggregate numbers on final orders removed but it does not report on those cases it chose to defer. See *DHS Statistical Table* at 40 (cited in note 113). Moreover, you cannot determine from this data when the administrative removal order became final. While the DHS completed 208,000 orders of removal in fiscal year 2005, many of those orders may have been pending for years.

cess to them and use of sophisticated sampling and multivariate analysis to draw conclusions.

While I am not an expert in the varieties and forms of analysis that might be used, I can suggest a few examples that might help further motivate Congress to commission such studies. Many people have counsel for the administrative hearing but are pro se at the BIA level; closer study of these patterns may identify a need for representation at the administrative level, even at government expense, to eliminate very weak appeals or to facilitate the analysis of the administrative agency.¹¹⁶ Based on the few interviews I conducted, it appears that many attorneys who handle immigration hearings and appeals to the BIA will not file a petition for review in the federal court. These attorneys routinely refer the case to counsel who specialize in federal litigation.¹¹⁷ While these specializations occur for a variety of reasons, one of the side effects is that the counsel who might have made errors in the advocacy before the administrative tribunal are not necessarily engaged in the case when those errors are identified by the judicial review process.¹¹⁸ The attorneys may repeat those same failures in the administrative hearings for new cases. Even if federal appellate counsel was successful in winning a remand in a particular case, there is no guarantee that the trial counsel will have learned from the litigation.

Used well, these data sets can aid the government in improving its efficiency or in meeting new prosecutorial priorities in the administrative system. While the DHS reports data on people ordered removed, they do not report data on people charged with removal.¹¹⁹ Providing minimal information, such as the status of the individual in proceedings (lawful permanent residents or other) and the nature of the charges alleged, would aid

¹¹⁶ While individuals have a statutory right to representation, the government is not obligated to pay for this representation. See INA § 292, codified at 8 USC § 1362 (2000). The EOIR and the BIA have wanted to conduct pilot studies to see if providing counsel for the noncitizens would aid or speed adjudication.

¹¹⁷ My observation is based on interviews with staff at the Second Circuit Court of Appeals and members of the American Immigration Lawyers Association.

¹¹⁸ This is true for the government as well because the DOJ attorneys at OIL handle the federal litigation rather than the agency attorneys within ICE who prosecuted the administrative case. While it may be true in other specialized practices areas that trial and appellate attorneys are often different, this is a new problem in immigration law and is cause for some concern, as a new specialized litigation bar is developing separately from the attorneys who represent people at the administrative agency level.

¹¹⁹ See *DHS Statistical Table* (cited in note 113). Again, while the DHS reports on the orders of removal and a single basis supporting the removal, it does not report on all cases initiated.

Congress in monitoring the prosecutorial priorities of ICE. It would also enable the administrative courts to better understand the patterns of issues likely to be litigated and perhaps provide additional resources to respond to those cases. For example, as ICE advanced the removal priority of noncitizens with criminal convictions, the EOIR had to establish more courtrooms and judges near the prisons and detention centers. Judges may need additional training on country conditions or forensic issues if there is a pattern of similar types of cases being referred by border inspections or by the asylum corps. Identification of these patterns will also help Congress evaluate whether the statutory basis of removal and the forms of relief are adequate and appropriate as applied.

As an example of how this type of analysis can help, consider the changes that resulted when Congress amended the definition of persecution to include victims of coercive family planning. The volume of Chinese asylum claims jumped. What does the jump mean? It may mean that Congress identified a real need for protection, but what does the high rate of refusal of these claims signify? The refusal rate may mean Congress selected a standard that is difficult to prove or that opened a door to claims that are based on false forensic evidence. The swell may indicate that the IJs became overwhelmed by the similarity of the cases and found it difficult to identify false claims. The high rate of refusal may mean that Congress needs to revisit the statutory standard and burdens of proof.¹²⁰ We can learn more if we know more than simply "the rate of refusal" or the aggregate number of cases. We need a contextualized analysis.

What should we make of the disparity between the rising number of final orders and the huge number of unexecuted orders?¹²¹ If we are unable to remove a significant number of people who have final orders, should the agency take earlier steps to prioritize placing the individual in proceedings or create administrative procedures for holding such cases in abeyance rather than forcing them through the system?¹²²

¹²⁰ See EOIR 2005 Statistical Year Book at J1–J2 (cited in note 25); TRAC Immigration, Facts (cited in note 112).

¹²¹ An unexecuted order may mean that the government has chosen not to physically remove the individual, has lost track of the individual or is unable to secure the documents necessary to effectuate removal.

¹²² Again, studying the implications of such an abeyance process would require an assessment of the harms and benefits to the government enforcement as well as the individuals involved. An individual who wishes to complete an asylum claim should not be stymied from that goal by the government choosing not to continue adjudication. Still, the

Congress should commission a variety of studies using multivariate approaches to the data. While finding direct cause and effect may be elusive, the analysis will surely reveal a more sophisticated understanding of the “how and why” of the increasing caseload in the federal courts, while also aiding the agency and Congress in refining and optimizing the adjudication process.

CONCLUSION

Are we willing to make the measurements and understand the dynamics of the immigration removal system? If Newton taught us anything, he taught us to stop making assumptions about the properties of things and to base our findings on careful analysis of causes and effects. Moreover, he contributed the tools to understand that universal forces impact the actions of physical materials. Until we search for the interrelationships and look at the catalyzing effects that drive the performance of the adjudicators and the litigants, our analysis will be imprecise.

Congress may be able to design a better system for the adjudication of immigration removal cases, but before attempting to design the new golden process, I urge Congress and governmental auditors to reflect more carefully and systemically on the operation of the current system. We can't get there from here until we understand the qualities and dynamics of the here and now.

patterns of litigation deserve closer study and the DHS may want to exercise much greater discretion in selecting cases for full prosecution. Further, Congress may want to create alternative adjudication systems for those individuals who believe they are qualified for benefits such as cancellation of removal, a discretionary form of relief that results in permanent resident status after ten years of continuous presence in the country. Currently, individuals have to be placed into removal proceedings to seek adjudication of this benefit. See INA § 240A, codified at 8 USC § 1229b (2000).